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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA,

Petitioner,

vs.

DWIGHT F. DAVIS, Secretary of War
of the United States, Successor to
JOHN W. WEEKS, Secretary of
War of the United States, COL.
T. Q. ASHBURN, Chief Inland &
Coastwise Waterways Service of
the United States, and JAMES E.
CARROLL, United States District
Attorney,

Respondents.

No. 718.

BRIEF OF PETITIONER.

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Solicitors for Petitioner.



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the United States, and JAMES E.
CARROLL, United States District
Attorney,

Respondents.

No. 718.

BRIEF OF PETITIONER.

**STATEMENT OF GROUNDS ON WHICH THE
JURISDICTION OF THIS COURT
IS INVOKED.**

This cause is in this honorable court in response to a writ of certiorari, issued to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, requir-

ing said Court to certify to this Honorable Court, for review and determination, the cause in which John W. Weeks, Secretary of War, et al., are appellants and Edward F. Goltra is respondent. Hon. Dwight F. Davis, successor to Hon. John W. Weeks as Secretary of War, has been substituted, by this Court, as respondent.

The opinions of the court below have not yet been officially reported, but are printed in the printed record of this case herewith filed and the same will be found therein. (R. 105, 126, 131.) See Federal Reporter, Second Series, Vol. 7, page 838.

The opinions were delivered, the decree and order of said Circuit Court of Appeals were filed and entered July 23, 1925 (R. 141).

The specific claims advanced, and rulings made in the lower court which are relied upon as the basis for the writ, are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

- (b) That such a suit was one, in effect, against the United States which could not be maintained.
- (c) That the Secretary of War had the right, in his judgment and discretion, arbitrarily to terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.
- (d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.
- (e) That by reason thereof the respondents, John W. Weeks, as Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms, said towboats and barges then in the possession and control of petitioner.
- (f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.
- (g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as

"party of the first part," and throughout refers to "him" as the lessor, and relates to and also recites the allotment of \$3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated and to take, arbitrarily, and by force, said property.

Second: The majority opinion of said court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law," to wit: sustaining respondents' arbitrary seizure of your petitioner's property under circumstances as set forth in Judge Sanborn's dissenting opinion (R. 139):

"Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on non-compliance, in his judgment, by plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor," is no grounds for "the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract, and his peremptory demand that the plaintiff surrender the property, his failure to give notice of

or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the court below, constituting due process of law.”

Third: The majority opinion of said Court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

The writ, in this proceeding, was issued by virtue of Section 240 of the Judicial Code, Act of Congress of March 3, 1911, as amended by the Act of February 13, 1925. The following cases sustain the jurisdiction of this Court.

International News Service v. Associated Press,
248 U. S. 215;
City of Denver v. New York Trust Company, 229
U. S. 123;

The important questions of law herein referred to, and the conflict of opinions rendered herein by the Circuit Court of Appeals, as well as the conflict with decisions of this Honorable Court and the weight of authority warranted the granting and issuing of the writ.

The three separate opinions of said Circuit Court of Appeals in the instant case;

- (a) Opinion of the Court by Pollock, District Judge (R. 105);
- (b) Concurring opinion by Symes, District Judge (R. 126);
- (c) Dissenting opinion by Sanborn, Circuit Judge (R. 131);

Ex parte, in the matter of the United States, as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

STATEMENT OF FACTS.

(1) *Events leading up to the execution of contract of lease and option to purchase four tow boats and nineteen barges.*

During the war between the United States and the Imperial Government of Germany, petitioner herein, "at the request of certain Government officials, as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view of producing pig iron at St. Louis, Missouri," as a result of which petitioner "entered into various engagements and undertakings to increase the pig-iron supply as a war measure, which may have created, and according to the contention of the lessee (petitioner herein) did create, obligations on the part of the United States to the said lessee (petitioner herein)" (R. 4, 56). As part of that undertaking as a war measure, which was to and did involve many millions of dollars, there was through "the United States Shipping Board Emergency Fleet Cor

poration allotted to the Chief of Engineers the sum of \$3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri" (R. 4, 56), and "on the 1st day of August, 1918, the Chief of Engineers of the United States Army entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal" (R. 4, 56).

Thereafter, on November 11th, 1918, said war preparations ceased and the Government began terminating all of its war contracts and engagements with many and enormous financial obligations due said contracting parties, including this petitioner, and found itself with many millions of dollars worth of finished and unfinished property on hand for which it had no use in the administration of the governmental affairs and was forced to dispose of same to the best advantage.

Like most of its war emergency undertakings, the matter of utilizing the Mississippi River for the transportation of iron ore and coal was an experiment, and the adaptability of said towboats and barges, theoretically designed, was also experimental, and continued to be an experimental proposition and undertaking even after said boats and barges were completed (R. 4, 56, 71).

Considerations for the contract were: "To enable the Government to dispose of the said barges more advantageously" (R. 4, 56), and moving from petitioner (referring to petitioner's claim against the Government),

“which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities” (R. 4, 56).

The foregoing was the basis upon which the contract was made and the considerations therefor.

(2) *Contract lease and option to purchase between Chief of Engineers of United States Army, designated as the lessor, and Edward F. Goltra, designated as lessee, dated May 28, 1919.*

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second” (R. 4, 56).

“Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery, to the lessee of the first barge or towboat the following described property”; covenants and agreements (R. 4, 56):

“2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats

and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs, without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made, provided the Secretary of War consents to such use other than as a common carrier" (R. 4, 56).

(b) Has to do with lessee paying all operating expenses and maintaining the fleet in good operating condition to the satisfaction of the lessor; to hold the United States free from liability, etc., in connection with operation, care and maintenance; discharge maritime liens; lessee to insure, both fire and marine, in such an amount as in the judgment of the Secretary of War * * * may require * * * against physical injury to them; lessee to provide fire, marine and towers liability insurance as in the judgment of the Secretary of War, etc., insuring each against such injury as may be inflicted by such vessel upon other property, etc., and if the lessor shall require, lessee to provide \$300,000 bond to protect United States against such liability or obligations, and against maritime or other liens and against depreciation in value, etc. (R. 4, 56).

(b-1) All salvage earned * * * shall be for benefit of United States (R. 4, 56).

(c) For protection of persons furnishing materials, service and labor in connection with operation, furnishing, repair, care and maintenance, etc., lessee to furnish bond for \$200,000 (R. 4, 56).

3. "Net earnings above operating expense and maintenance for every ton of cargo moved, and other net earnings shall be turned over to Secretary of War, etc., for deposit with the Treasurer of the United States," in a special deposit account, and shall continue so to be turned over to him and so deposited by him until such time as said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall, until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to

any other operating expense and maintenance in connection therewith (R. 4, 56).

Lessee to keep accurate account, "and his accounts shall at all times be subject to inspection by the lessor" (R. 4, 56).

4. Provides for selection of national bank depositories.

5. (Option to Purchase). "Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the

lease, or otherwise held on deposit, shall be paid to the lessee.

“(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

“(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of the lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 thereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value (R. 4, 56).

“6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

“There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

7. “Lessee assumes full responsibility for all employes, plant and material, boats and barges and for damage or injury done to or by them (R. 4, 56).

8. “The lessor reserves the right to inspect the plant, fleet and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and tow-boats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels” (R. 4, 56).

The contract is signed:

“William M. Black, Major General, Chief of Engineers, U. S. Army, (First Party)—
Edward F. Goltra (Second Party).”

Memo:

At the end of the contract is a written memo. in part as follows:

“It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army, and Edward F. Goltra, Parties of the First and of the Second Part respectively” (R. 10, 56).

(3) *Supplemental contract between Chief of Engineers of United States Army, designated as lessor, and Edward F. Goltra, designated as lessee, dated May 26, 1921.*

“Whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) towboats, belonging to the United States.

“And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified for the following reasons:

“To more fully provide for the operation of the said barges and towboats as a common carrier by providing

unloading facilities at St. Louis, Missouri, by the use of funds remaining from the allotment of \$3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

"Now, therefore, the said contract is, by this supplemental agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:" (R. 57)

Among other things therein, it is provided that "Lessee, at his own expense, will provide the necessary tract of land and runway on which the said unloading facilities are to be erected—said tract to be selected by the lessor, subject to the approval of the lessee.

Lessee to provide insurance (R. 57).

"The items of the original lease as to inspection (paragraph 8) shall govern so far as applicable and pertinent, etc."

"The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and runway on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee and said runway to be built according to plans submitted by lessee and approved by the lessor.

"The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and char-

acter mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

“The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

“The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

“The terms of the original lease as to net earnings (paragraph 3), appraisement and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities.

“In case the said lessee, his heirs, administrators, executors or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors or assigns, take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

“In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of

three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

"This supplemental agreement shall be subject to the approval of the Secretary of War (R. 57, 58, 59).

"In witness whereof, the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement (R. 59).

Witnesses:

P. J. Dempsey	as to Lansing H. Beach Major General, Chief Engineers.
	as to
Thomas M. Robins Major, Corps of Engineers	as to Edward F. Goltra as to
	(Executed in Triplicate.)
Approved.....	192

.....
Major General, Chief of Engineers, U. S. Army.
Approved: May 27, 1921.

J. M. Wainwright,
Assistant Secretary of War."

Contract Executed:

All of the terms and conditions precedent specified in said contract and supplemental contract were strictly and duly complied with on the part of the lessee, and on July 15, 1922 (R. 71) said lessor, the Chief of Engineers of the U. S. Army, turned over and delivered said boats and

barges thereunder to petitioner herein, after petitioner herein had secured, at his own expense, and turned over to the Chief of Engineers, fire, marine and liability insurance, and bond in sum of \$200,000 (R. 69).

After the delivery of said boats and barges the lessee was obliged, at large expense to himself, to make certain changes, alterations, and repairs thereon before same was adaptable for transportation service on the river (R. 71).

On March 25th, 1923, and prior thereto said contract and supplemental contract were completely executed by both parties thereto, and said lessor therein had duly and completely turned over and delivered all of said property to petitioner herein as his property for a term of five (5) years with option in him to purchase, and petitioner was in possession (R. 4, 69, 56, 71).

The petitioner had, in all respects, fully complied with all terms and conditions of said contract and supplemental contract (R. 68, 69).

(6) *Government Barge Line Service on Mississippi River.*

For some time prior to March 2, 1921, the Government barge line was operated on the Mississippi River, and engaged in the transportation of commodities for shippers in the Mississippi River Valley at rates of 80 per cent of the all-rail rates (R. 59).

The Government Barge Line, operated under the name of the Mississippi-Warrior Service (R. 65). These opera-

tions were under the officials of the Inland and Coastwise Waterways Service (R. 65).

During the year 1923 Col. Ashburn was chief of the Inland and Coastwise Waterways Service (R. 83).

The Inland Waterways Corporation, under Act June 3, 1924 (Fed. Stat. Anno. Supp. 1924, p. 185), became the successor to the Mississippi-Warrior Service, and to the Inland and Coastwise Waterways Service. All boats and barges were transferred, by this act, from the Secretary of War to the Inland Waterways Corporation, and the act provides that said Corporation may sue and be sued.

Col. Ashburn became and now is chairman of the board and the executive of the Inland Waterways Corporation (R. 83).

(7) *Acts of parties to contract of lease and option to purchase during period of construction of boats and barges in anticipation of delivery thereof to Goltra.*

On March 2, 1921, Mr. Goltra requested the Chief of Engineers of the United States Army, as lessor, to secure authority for him to quote "the same rates as obtain on the Government Barge Line now operated on the lower river, viz., 80 per cent of the all-rail rate" (R. 59).

This authority as to rates was granted by the Secretary of War on March 4, 1921 (R. 60). This authorization was denied on March 31, 1922, as not having been approved on the grounds that the Secretary of War would approve no operation on the lower Mississippi "that would enter into

competition with the established line of barges" (R. 62). Under date of April 28, 1922, Mr. Goltra transmitted a letter to the Secretary of War, through the Chief of Engineers of the United States Army, as lessor, therein referring to a conversation previously had relative to the contract and operations thereunder, and in which he informs the Secretary of War: "Acting in good faith upon same, I obligated myself to transport hundreds of thousands of barrels of oil in bulk from New Orleans to Roxana, Illinois; also I have obligated myself to transport coal from Kentucky to St. Louis, up to 2,000 tons a day; I have also agreed to transport manganese ore from New Orleans to the blast furnace at St. Louis," at 80 per cent of the prevailing rail rate (R. 63, 64). To this letter the Secretary of War replied, May 6, 1922, as follows: "The consent and approval of the Secretary of War heretofore, on the 4th day of March, 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80 per cent of the prevailing rail tariffs, is hereby withdrawn and canceled as to any and all contracts, agreements and undertakings for transportation on the Mississippi River and its tributaries below the City of St. Louis, Missouri, hereafter made and entered into by you" (R. 64). On May 25, 1922, the Secretary of War authorized a rate of 80 per cent of the all-rail rate for the transportation of a limited list of commodities, viz.: "Liquid in bulk, including liquid asphalt or road oil, in drums; coal, lumber,

sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity," and therein further admonished that Mr. Goltra shall not engage in such commodities as to stifle the success of the Mississippi River Service (R. 65, 66).

Acts Subsequent to Delivery of Boats and Barges.

The boats and barges were delivered to Mr. Goltra on July 15, 1922; thereafter tests were made; great trouble was encountered in making sufficient steam with coal; one of the towboats, the Illinois, was then converted from a coal to an oil burning boat; these tests and changes caused delays; Mr. Goltra then proceeded to Caseyville, Kentucky, with the towboat, Illinois, and four or more barges, about August 15, 1922, for a cargo of coal and returned to St. Louis about September 15, 1922; about October, 1922, the towboat and barges were taken to Hannibal, Missouri, for a tow of 3,000 tons to be transported to St. Louis. The navigation season ended about December 15, 1922, and remained closed until about March 1, 1923, on account of the winter (R. 70, 71).

(8) Events leading up to the seizure of the boats and barges on Sunday, March 25th, 1923.

Without notice and without an opportunity to be heard (R. 68, 69), on Sunday, March 4, 1923, in the City of Washington, D. C., Mr. Goltra was presented with a let-

ter from the Secretary of War, dated March 3, 1923, by Col. Ashburn (R. 83), undertaking to cancel the contract of lease and option to purchase under authority claimed under paragraph eight (8) of the contract for the following stated reasons: "You are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars," and therein directed the immediate delivery of possession of the boats and barges and unloading facilities to Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service (R. 67). Attached to this letter was a letter of instructions by the Secretary of War to Col. Ashburn, which provided: "In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property" (R. 67). Col. Ashburn then proceeded to St. Louis and demanded that Mr. Goltra comply with the foregoing demand by 6 o'clock p. m., Thursday, March 8, 1923 (R. 68); on March 8, 1923, Mr. Goltra replied, in writing to the Secretary of War, declining to comply with the demand, stating that "I have, in the face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my con-

tract," and further stated, "The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This, I believe, will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice, I now request" (R. 68). No reply was ever made to this letter.

Conferences With U. S. District Attorney and Department of Justice.

This petitioner, through his attorneys, conferred with the United States District Attorney for the Eastern District of Missouri, March 7, 1923, relative to the letter served on petitioner dated March 3, 1923 (R. 80, 100). The District Attorney had been consulted by Col. Ashburn and others with reference to taking some legal procedure for the purpose of taking possession of the boats and barges (R. 81). Col. Ashburn had consulted the United States District Attorney in his office and was accompanied by Mr. Cole and Judge Lovett, representatives of the Department of Justice on March 6th or 7th (R. 100). The District Attorney stated that it was his opinion that Col. Ashburn and Mr. Weeks were justified in seizing the boats and barges by force, if necessary (R. 81), and that he did not know what court action Col. Ashburn and Mr. Weeks could take following the termination of the contract, and that if they seized the boats, Goltra would have

a remedy by way of injunctive relief, but that it would be burdensome to Mr. Goltra, because he would have to furnish a tremendous bond (R. 81). The District Attorney suggested that Mr. Goltra compromise (R. 99).

A second conference was had between Mr. Goltra's attorney and the District Attorney, upon the latter's invitation of March 10, 1923 (R. 81, 101). The District Attorney was still in doubt as to the procedure, and again suggested compromise (R. 81); that at least one-half of the fleet be turned over by Mr. Goltra to the Government (R. 100). That he had resigned as District Attorney and had informed Col. Ashburn that he would not take up the problem unless retained privately (R. 99). That he had succeeded in making arrangements, satisfactory to himself, to be employed privately by these people, and that if he succeeded in delivering these boats and barges he would be retained as counsel for the Mississippi-Warrior Service, and that it was the intention of the Mississippi-Warrior Service, within about two years, to have all of these boats and barges turned over to private interest or private parties (R. 81, 82). Later, he represented, in this action, the Mississippi Valley Association (R. 100).

On March 11 or 12, 1923, another conference was held with the District Attorney and Mr. Cole of the Department of Justice, at which time Mr. Goltra's attorney was told that they were going to take the fleet. After directing their attention to Col. Ashburn's instructions from the Secretary of War relative to taking legal proceedings, they

stated that the Government was not going to bother itself about bringing any suits, and that if there were any to be brought Mr. Goltra had to bring them. They were going to throw the burden on Mr. Goltra. Compromise was again suggested (R. 82, 83).

Further Acts by Col. Ashburn Before Seizure.

After Col. Ashburn and Mr. W. L. Cole, one of the Assistant Attorneys-General of the United States, had conferred with the District Attorney at St. Louis, at which conference it was decided that they did not know how to proceed through an order of court to get possession of the barges and that it would be proper to seize the boats, Col. Ashburn and Mr. Cole returned to Washington (R. 95). Col. Ashburn was strongly in favor of seizing the boats and barges and recommended to the Assistant Secretary of War that an order be issued directing him to seize the fleet (R. 95). On the afternoon of March 22, 1923, Col. Ashburn went to the office of the Assistant Secretary of War for the specific purpose of obtaining an order to seize (R. 94). At that time, he was given the order to seize, dated March 22, 1923, executed by the Assistant Secretary of War (R. 84). Immediately thereafter, Col. Ashburn, Chief Inland and Coastwise Waterways Service telegraphed his subordinates, "who were operating the Mississippi-Warrior Service, to have the towboat Vicksburg" meet him on the morning of the designated date (R. 84). The designated date was Sunday morning, March 25th, 1923 (R. 97).

(9) *The seizure of the boats and barges at St. Louis, Missouri, Sunday, March 25th, 1923.*

Col. Ashburn wired Mr. J. P. Higgins, an employe of the Mississippi-Warrior Service from Birmingham (R. 96), to meet him in St. Louis, Sunday morning (R. 97). Mr. Brent, manager of the Mississippi-Warrior Service, telegraphed Mr. C. E. Patton, river captain and superintendent of the Mississippi-Warrior Service, to meet Col. Ashburn in St. Louis, on Sunday morning (R. 98).

Mr. Higgins and Capt. Patton met Col. Ashburn at the station where Col. Ashburn informed them of the contemplated seizure (R. 97). No notice was given to Mr. Goltra. Col. Ashburn notified nobody because he did not want to be interfered with. "I thought, if I exercised secrecy about it, I would get the boats in the possession of the United States without any interference, which I desired to do" (R. 96).

Immediately upon reaching the steamer Vicksburg, one of the Mississippi-Warrior Service towboats, Col. Ashburn directed the captain to get up steam and seize the Goltra boats (R. 84). The first seizure of part of the fleet took place between 8 and 9 o'clock Sunday morning (R. 85). Captain Simmons was in charge of this part of the Goltra fleet, and when Col. Ashburn undertook to seize, Captain Simmons started ashore to notify Mr. Goltra, but was restrained by Col. Ashburn and Captain Patton (R. 69), and was informed by Col. Ashburn: "I told

him it was immaterial to me whether he got in touch with Mr. Goltra or not; that the order required me to take peaceful possession of the boats. I told him I wished he would not interfere or get in touch with Mr. Goltra, because it might cause me to disobey my orders or fail to carry them out" (R. 84). He threatened the chief engineer on the Goltra boat with physical violence, and threatened the captain with jail (R. 85, 69). Coercion and threatened force were used in the seizure (R. 69, 72, 74, 75, 76, 78, 79, 80, 85, 86). A large force of men was used by Col. Ashburn in making the seizure (R. 70, 72, 75, 79). Police officer resisted by Col. Ashburn (R. 74, 76). Firearms in evidence (R. 70, 72, 79). Although demanded, Col. Ashburn refused to give Goltra's representatives a copy of the alleged order of the Assistant Secretary of War under which he claimed to have been acting (R. 69, 74, 77).

Goltra's attorneys drew the bill of complaint Sunday afternoon (R. 77). Temporary restraining order and order to show cause were issued Sunday, March 25, 1923, by Hon. C. B. Faris, Judge of United States District Court for the Eastern District of Missouri (R. 26, 27). Col. Ashburn was advised by Mr. Wallace, representative of Mr. Goltra, Sunday afternoon, March 25, 1923, while Col. Ashburn was in the act of seizing more of the fleet, that a bill praying for an injunction against him was being prepared and would be served upon him. Thereupon Mr. Wallace was ordered off of the boats and barges by Col. Ashburn

(R. 80, 87). Col. Ashburn continued the seizure, and removed all seized boats and barges from the Missouri shore to the Illinois shore about six miles south of St. Louis (R. 85-87). Col. Ashburn took the boats and barges to the Illinois shore side "because I was directed to seize these barges, and I thought that if I had them over on the Illinois side I could arrange my tows and barges in such a way as to get them conveniently down the river. I was also of the opinion that if I got them over to the Illinois side, the Court here would have no jurisdiction" (R. 95). After seizing the four towboats and seventeen barges, he proceeded down the river to Cairo, Illinois, with the intention of keeping them out of the jurisdiction of the United States District Court for the Eastern District of Missouri (R. 96). Col. Ashburn was served with summons and order of Court on March 26, 1923, which he tried to evade (R. 73). He was served again as he was proceeding down the river on March 27, 1923, and again tried to prevent and evade service (R. 73, 75, 77). Col. Ashburn ignored the restraining order and seized more of the fleet after service (R. 77, 27, 28). They retained possession of these boats and barges after the seizure until about July 26, 1923, when they were brought back into port (R. 71). At the time of seizure, the fleet was docked at St. Louis for the winter (R. 70, 71). The fleet was seized for and on behalf of the Mississippi-Warrior Service for use in transporting commodities in connection with its barge line (R. 81, 98).

In June, 1923, on motion of the United States in the

Supreme Court of the United States, a writ of prohibition was prayed against Hon. C. B. Faris, a judge of the United States District Court for the Eastern District of Missouri. See: In the Matter of the Petition of the United States of America as Owner of Nineteen Barges and Four Towboats, 263 U. S. 389.

Pursuant thereto, upon an ex parte petition and an ex parte hearing in vacation of the Supreme Court of the United States, and upon vacation order issued by said Court thereon, Col. Ashburn again took possession of said boats and barges about August, 1923, and retained the same until on or about the 11th day of July, 1924 (R. 44, 71); and the said boats and barges were used in connection with the Mississippi-Warrior Service, but only the steamer, Illinois, of the four towboats, was used with the exception that the steamer Iowa was used for a few trips. The steamers Missouri and Minnesota were never used by the Mississippi-Warrior Service although in their possession (R. 71).

It required an order of the District Court, July 7, 1924, in the nature of an order to show cause why the defendants (respondents here) should not be punished for contempt before said boats and barges were returned to Mr. Goltra (R. 44). Said boats and barges, by virtue of the order granting the temporary injunction September 4, 1924 (R. 44), the decree of the Circuit Court of Appeals (R. 141), and the order modifying said order (R. 147), are now in the possession of the petitioner herein, and

since District Judge Faris, in September, 1924, ordered the boats and barges returned to the petitioner herein, and permitted and ordered their operation, said petitioner herein has been operating the same continuously to their full capacity in the transportation of all kinds of grain, ore and coal, and has commitments for future full capacity operations (R. 143, 144).

ASSIGNMENT OF ERROR.

The United States Court of Appeals for the Eighth Circuit erred in the following particulars:

1. In holding that this cause is a suit against the United States Government and that the Government is an indispensable party, and that unless the Government shall enter its appearance no decree as prayed in the bill of complaint may enter.
2. In holding that the complainant could not proceed in equity against officers of the Government for illegal and arbitrary interference with the rights of the complainant acquired under the lease.
3. In holding that the lease was made by the United States Government and that the title to the boats and barges was in the United States Government.
4. In failing to hold that as the United States Government had entered into a commercial enterprise, and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity.
5. In holding that the contract for the lease of the barges reserved to the Government the right, obligation, duty and power to cancel and abrogate the lease if, in the judgment of the Secretary of War, the lessee was not complying with any of the terms or conditions of the lease.

6. In holding that the so-called specific breach of the lease (failure to operate as a common carrier), cited in the letter of the Secretary of War, March 3rd, declaring the contract terminated, is admitted by the bill and fully established by the evidence.

7. In failing to hold that the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri had authority, in the exercise of its judicial discretion, to issue a temporary injunction to hold the vessels temporarily until there could be a hearing and decision.

SUMMARY OF POINTS AND AUTHORITIES.

I.

This is not a suit against the Government of the United States, and the United States is not a necessary party thereto:

State of Colorado v. Toll, decided May 11, 1925,
69 Adv. Op. 581, 45 S. C. Rep. 505;
United States v. Lee, 106 U. S. 196;
Shipping Board Cases, 258 U. S. 549;
State of Colorado v. Toll, 15 S. Ct. Reporter, June
1st, 1925, page 581;
Stanley v. Schwalby, 147 U. S. 508, l. e. 518, also
523, dissenting opinion of Field, J.;
Belknap v. Schild, 161 U. S. 10, l. e. 19;
Tindal v. Wesley, 167 U. S. 204, l. e. 213;
Ex Parte Young, 208 U. S. 123, l. e. 151;
Philadelphia v. Stimson, 223 U. S. 605, l. e. 619;
Louisiana v. McAdoo, 234 U. S. 627, l. e. 629.

II.

The United States District Court for the Eastern District of Missouri, as a court of equity, had jurisdiction and authority to restrain these respondents, even though they were officers of the United States, from wrongful and unwarrantable interference with property of the petitioner herein in an arbitrary, unwarranted and illegal manner, and such relief to your petitioner cannot be de-

feated upon the ground that the suit is one against the United States:

State of Colorado v. Toll, *supra*;
Osborn v. The Bank of the United States, 9 Wheat. 738;
Noble v. United River Logging Railroad Co., 147 U. S. 165;
Philadelphia Co. v. Stimson, 223 U. S. 605, 613, 619;
Lane v. Watts, 234 U. S. 525;
Payne v. Central Pac. Ry. Co., 255 U. S. 228, 231;
American School of Magnetic Healing v. McAnulty, 187 U. S. 94, l. e. 110.

III.

Where the Government of the United States has entered into a commercial enterprise and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity:

Bank of United States v. Planter's Bank of Georgia, 9 Wheat. 904;
Bank of Kentucky v. Wister, 2 Pet. 318;
Brisecoe v. Bank of Kentucky, 11 Peters 257, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
South Carolina v. United States, 199 U. S. 43;
Shipping Board cases (*supra*);
Sec. 201 (e) of the Transportation Act of 1920.

IV.

The contract of lease and option to purchase is not a contract with the Government of the United States in its sovereign capacity.

Shipping Board cases (*supra*).

V.

It is within the jurisdiction of the United States District Court, in the exercise of its judicial discretion, to grant the temporary injunction to hold the vessels temporarily until there could be a hearing and decision, and with this discretion the Court of Appeals should not have interfered.

Denver & Rio Grande R. R. Co. v. United States,
124 Fed. 156;
Stearns Roger Mfg. Co. v. Brown, 114 Fed. 939.

VI.

The decision of the court below in sustaining the appellants below deprives the petitioner of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

VII.

Clause 8 of the contract of lease does not warrant the construction placed thereon by the court below to the

effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein, the power to terminate said contract, at his discretion or in his judgment, in an unwarranted and arbitrary manner, and thereby seize the property of the petitioner herein.

Shipping Board cases, 258 U. S. 549;
6 Ruling Case Law, 906, Sec. 291;
3 Story's Equity Jurisprudence;
Chapt. XXXVII, 14th Ed., 1918, Sec. 1728;
Phil. W. & B. R. Co. v. Howard, 13 How. 307;
Hartman v. C. B. & Q. R. Co., 182 S. W. 148;
United States v. U. S. Engineering & C. Co., 234
U. S. 236;
Dist. of Columbia v. Cambden Iron Works, 181
U. S. 455;
Cheney v. Libby, 134 U. S. 69;
United States v. Peck, 102 U. S. 64;
United States Harness Co. v. Graham, 288 Fed.
929.

ARGUMENT.

The Court of Appeals, in the majority opinions (R. 105, 126), decided that this suit is one against the United States and that no decree can be entered unless the Government shall enter its appearance (R. 118). The decision is based upon six grounds, viz.:

That the Secretary of War was acting within the scope of his power in declaring the lease void.

That the lease contained a provision reserving to the Government the right to abrogate the lease if, in the judgment of the Secretary of War, the lessee was not complying with its terms.

That the vessels were the sole property of the United States.

That the lease contract was made by and with the United States.

That the allegations in the bill control.

That the petitioner admitted the breach and that there was neither allegation nor testimony that he had performed.

The salient omissions in the majority opinions are:

The property rights of the petitioner, of which he was deprived without due process of law.

That a citizen may maintain an action against officers of the Government to restrain an arbitrary or illegal interference with his rights even though they claim to be acting under the authority of their office.

The devolution of the title to the vessels, which was not in the United States.

That the lease was not made by the United States Government or the Secretary of War, but with the Chief of Engineers, described as "the lessor."

That the forfeiture clause does not relate to the operation of the vessels.

That the vessels were operated as a common carrier by the lessee excepting when the petitioner was prevented by the acts of the Secretary of War.

That the Government had stepped down from its place as a sovereign, and was engaged in a gainful pursuit as a trader, and could not, as such, claim the immunity pertaining to sovereigns.

That it was within the judicial discretion of the District Court to grant the temporary injunction to hold the vessels temporarily until there could be a fair hearing and that such discretion should not have been interfered with by the Court of Appeals unless the District Court had acted improvidently, illegally or abusively.

These acts of commission and omission will be taken up in the course of this brief.

It is obvious that the bill, drawn hurriedly, upon Sunday, could not have been drawn with the same degree of accuracy as to the language used and in stating clearly all of the facts. The bill, however, as a whole does state the facts with sufficient accuracy and definiteness to enable the District Court to act upon, and the bill as a whole, in substance and form, clearly indicates and shows that this is not an action against the United States, and that the United States is not a necessary party for the purpose of

the District Court granting the necessary and substantial equitable relief prayed for.

This is not an action for specific performance, but is an action for the purpose of maintaining and restoring the private rights and property rights under an executed contract. Nor can this action be construed to be one to divest title to property, but is one to restore possession of the same and to place the parties in the same position in which they were before the alleged unlawful acts of the defendants changed that status.

All conditions precedent having been complied with by both parties to the contract up to and at the time of the delivery of the property to the petitioner, and, under the granting or charter clause all property and possessory rights being definitely and expressly fixed and vested, the contract in respect thereto was executed and left no property rights to be divested out of the United States.

The executory part of said contract pertains merely to certain covenants as to future obligations, rights, privileges, declaration of purposes and option to the petitioner to purchase.

It really makes no difference what language was used in describing the contract in the hurriedly drawn bill. The contract itself is before the Court, and shows clearly that it was not made by the United States Government as lessor. It really makes no difference whether or not the United States Government is the ultimate beneficial owner of the boats and barges. Mr. Goltra had acquired posses-

sion of these boats and barges through a valid contract, and it was the unlawful interference with his right by the defendants which he sought to restrain. It really makes no difference whether that contract was made by the Chief of Engineers as lessor or the United States Government as lessor. No matter who was the lessor the property was lawfully in the possession of Goltra and no person, whether officers of the United States Government or private citizens, had the right to interfere with that lawful possession. As was said by Judge Faris in his last opinion (R. p 49):

“But I say to you, for the reasons that I have thus lamely given, that I doubt whether it makes any difference, because if officers of the United States, in the name of the United States, can do things of the kind that were done here; can arbitrarily do these things can take the property of citizens regardless of the courts, and without resorting to the courts, while they say to others, ‘you must be law-abiding. You must go into court, you must not take the law into your own hands,’ then this republic cannot long endure under that species of tyranny.”

POINTS I, II, III, IV AND V.

This is Not a Suit Against the United States, and the Court Had Power to Restrain the Unauthorized Acts of Officers.

The dissenting opinion of Sanborn, Circuit Judge, in this case (R. 131), is a clear exposition of the law and the

facts. In that will be found all of the questions, many of which are not referred to in the majority opinions. Each one is carefully reviewed and answered. It is a potent argument in favor of the petitioner. It remains only for us to point out the errors in the majority opinions.

The majority opinions of the Court of Appeals are directly in conflict with a number of decisions of this Honorable Court, the latest one, which we are able to find is that of State of Colorado v. Toll, 268 U. S. 228. That case involved Government property, through which state roads ran. The District Court dismissed the bill brought by the state and this Court said:

“The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do and that derogate from the quasi-sovereign authority of the State. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining either his superior officers or the United States (Missouri v. Holland, 252 U. S. 416, 431; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620.”

The majority opinions place much reliance upon the case of Wells v. Roper, 246 U. S. 335 (R. 122, 124, 129).

A careful reading of this case will disclose an entirely different state of facts and that it is not applicable to the case at bar.

In that case, based upon a contract with the Postmaster General acting for the United States, in its gov-

ernmental capacity, the contract provided specifically that the Postmaster General or the First Assistant could terminate the contract under this stipulation; "any and all of the equipment contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part" and the "Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his contracts should be cancelled, etc."

Furthermore, it will be noted in that case, that in so doing the Postmaster General was acting in an official capacity under a specific appropriation of Congress for the very purpose contemplated in said contract wherein he was given discretionary power under the appropriation.

"Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, Chap. 33 etc., **by which he was authorized in his discretion to use such portions, etc.**"

The Court of Appeals also relied upon the case of *Noble v. Union River L. R. Co.*, 147 U. S. 165 (R. 123, 128), but it is apparent that in so doing it assumed that the Secretary of War was acting in a judicial or discretionary capacity though there is absent any authority so to act, in either the lease or the contract, and the contention here is, as in that case, that his acts were ultra vires. In fact the majority opinion is in conflict with the opinion in the

case of Noble v. Union River Co., *supra*, for it is there held:

"This was a bill in equity by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's maps for a right of way over the public lands, and also from molesting plaintiff in the enjoyment of such right of way secured to it under an Act of Congress." * * *

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do." * * *

"It was not competent for the Secretary of the Interior thus to revoke the action of his predecessor, and the decree of the Court must, therefore, be affirmed."

The opinion holds that the case of Philadelphia Co. v. Stinson, 223 U. S. 605, is not in point (R. 128), because the complainant there "did not ask the Court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made." And the opinion further states that, "The converse is true in the case at bar." By this ruling

the conflict with the case of Philadelphia Co. v. Stimson, *supra*, is apparent. The authority to cancel the lease is challenged here, the complainant contending that the Chief of Engineers alone had the discretion and that even he could not abrogate the lease for the reasons given in the letter of the Secretary of War, March 3, 1923 (R. 67). In Philadelphia Co. v. Stimson, *supra*, though the plaintiff was denied his claim on the facts pleaded, the right to bring the proceedings against the Secretary of War was fully sustained, and the suit by way of injunction was held to be in personam, and was not against the United States. That case was an appeal from a decree sustaining a demurrer to a bill to set aside certain harbor lines so far as they encroach on complainant's land, and to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against complainant for reclamation and occupation of land outside of the prescribed limits.

The defendant (Secretary of War), made the point among others:

“1. This proceeding is virtually a suit against the United States.”

The opinion was by Mr. Justice Hughes, and on page 619, the Court said:

“First: If the conduct of the defendant constitutes an unwarrantable interference with property of the

complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing many cases). And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (*Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868, and many other authorities). And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred" (citing cases).

So also, *Lane v. Watts*, 234 U. S. 525. Appeal from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, enjoining the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of certain attempted entries under the public land laws.

Mr. Justice McKenna, delivering the opinion of the Court, said:

"The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department (*Ballinger v. United States*, 215 U. S. 240). In other words, and specifically, the action of

the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined (*Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Philadelphia Co. v. Stimson*, 223 U. S. 605). The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of the appellees.

“This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of title to land not situated within the jurisdiction of the court ‘wherein an essential party not present in the forum and is not even suable—the United States.’ ”

The majority opinions are in conflict with the case of *United States v. Lee*, 106 U. S. 196. This case is cited by the Court (R. 119), and distinguished on the ground that the property was held not to be that of the United States and the majority opinions state that the plea of immunity rested upon the facts in the case, that is, if ownership in the complainant was not proven, the plea would be denied. In so doing the Court, of course, assumed again, as a matter of law, that the vessels in controversy were the sole property of the United States and that Mr. Goltra had no rights, or property rights, in them which might be taken without due process of law.

The Lee case was an action by plaintiff against certain officers of the Government to recover land held by the Government, and devoted to public uses, as "Arlington Cemetery." In that case—as in this—the Attorney-General filed a "suggestion" that the cause was against the United States. And he "moved that the declaration in the suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises."

Mr. Justice Miller, in that case, wrote a powerful opinion, which has been followed as the law ever since in a large number of cases, and has never been overruled. In setting forth the fundamental principles—which are as applicable to the case at bar—he said:

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice

Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

“But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?”

Again he said:

“Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights. * * *

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this Court in the case of Carr v. United States, already referred to, the Government is always to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."

Among the many cases in which the case of United States v. Lee, *supra*, has been cited are the following:

- Stanley v. Schwalby, 147 U. S. 508, l. e. 518, also 523, dissenting opinion of Field, J.;
- Belknap v. Schild, 161 U. S. 10, l. e. 19;
- Tindal v. Wesley, 167 U. S. 204, l. e. 213;
- Wadsworth v. Boysen, 148 Fed. 771, l. e. 780;
- Ex parte Young, 208 U. S. 123, l. e. 151;
- Philadelphia v. Stimson, 223 U. S. 605, l. e. 619;
- Louisiana v. MeAdoo, 234 U. S. 627, l. e. 629;
- McComb v. U. S. Housing Corp., 264 Fed. 589, l. e. 592;
- Muenster v. Meredith, 264 Fed. 243, l. e. 246;
- Walker v. Ford, 269 Fed. 877, l. e. 178;
- The Pesaro, 255 U. S. 216, l. e. 219;
- The Pesaro, 277 Fed. 473, l. e. 475;

Sloan Shipyards Corp. v. U. S. Shipping Board,
258 U. S. 549, l. e. 567;
Mfrs. L. & Imp. Co. v. U. S. Board E. F. Corp.,
284 Fed. 231, l. e. 234.

The decision also conflicts with that of Sloan Shipyards v. U. S. Fleet Corp., 238 U. S. 549, cited by the Court (R. 130). The question of the title to the vessels is discussed under a separate heading in this brief, but the Court differentiated the Shipyards case on the ground that it could not be assumed from "the allegations of the bill alone," that the Fleet Corporation did not have the power delegated to it by the President.

On the other hand, the Court of Appeals overlooked the allegations in the bill in the case at bar, that in this bill it is alleged that the alleged breach, mentioned in the letter of the Secretary of War, March 3, 1923 (R. 67); i. e., failure to operate as a common carrier, was not committed, but also that after Mr. Goltra had operated the vessels as such he was prevented from further so doing by the Secretary of War, who issued orders requiring Mr. Goltra to charge for carrying freight the prohibitive 100 per cent railroad rate (R. 62, Ex. 6; 64, Ex. 9; 65, Ex. 10).

In the Shipping Board cases, 258 U. S. 549, the Court, through Justice Holmes, said (after reciting the facts that the contracts were made for and in behalf of the United States—and the relief sought in equity was to restore certain property to complainants which had been

taken by defendants and to cancel contract substituted by defendant for the original contract):

"They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts. * * *

"The plaintiffs are not suing the United States, but the Fleet Corporation; and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. **It is not impossible that the Fleet Corporation purported to act under the contract giving it the right to take posses-**

sion in certain events, but that the plaintiffs can show that the events had not occurred. * * *

"We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

The case of United States Harness Co. v. Graham et al., 288 Fed. 929, was, in practically all respects, similar to case under consideration, and was determined upon a motion to dismiss wherein the grounds for dismissal urged were:

"It plainly appears from the bill and exhibits filed therewith that this suit is one involving substantial property rights and interests of the United States Government, and therefore while nominally a suit against the individual defendants, is, in fact, one against the United States.

"That the same is prosecuted without the consent of the United States.

"The bill is one for an injunction only and no other relief is specifically prayed for in the bill."

In that case complainant secured a restraining order and a mandatory order to restore the property already taken.

The defendants, officers of the War Department, were operating under an order of the President of the United

States and the Secretary of War and proceeded to seize the goods by force of arms, without giving the complainant an opportunity to be heard—and seized the property before the restraining order could be issued.

The Court, in overruling said motion, said:

“Upon considering the matters thus far involved in this suit, I am confronted with Article V of the Constitution of the United States, wherein it states:

“No person shall * * * be deprived of life, liberty or property without due process of law. * * *”

And again:

“Is the citizen to be denied his right of intervention and protection from the judiciary solely because the President has signed a paper that would strike down the claimed vested legal property rights of a citizen?

“Can contracts alleged to have been legally entered into between citizens and duly authorized representatives of the Government be declared void by the President without resort to the judiciary and an opportunity being given those claiming vested rights thereunder to be heard?

“I do not think so.”

The right to enjoin officers of the state in a matter which directly affects the state and its powers was early decided by the Supreme Court of the United States in *Osborn v. The Bank of the United States*, 9 Wheat. 738.

This is a leading case, and has been frequently cited with approval and followed. The opinion was by Chief Justice Marshall and is a familiar one in the political and judicial history of the country.

In Payne v. Central Pac. Ry. Co., 255 U. S. 288, Mr. Justice Van Devanter delivered the opinion of the Court, l. e. 231:

"This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue (46 App. D. C. 374). An appeal under p. 250, par. 6, of the Judicial Code brings the case here."

After a discussion of the case (*quod vide*), the Court continues, l. e. 238:

"We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title (Ballinger v. Frost, 216 U. S. 240; Philadelphia Co. v. Stimson, 223 U. S. 605, 619-620; Lane v. Watts, 234 U. S. 525, 540)."

The power of the Postmaster General was checked by an injunction in American School of Magnetic Healing v.

McAnnulty, 187 U. S. 94. In that case, Mr. Justice Peckham applied the rule of law as follows, p. 110:

“The Postmaster General’s order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto, until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, **yet such decision, being a legal error, does not bind the courts.**”

Wadsworth v. Boysen, 148 Fed. 771, C. C. A., 8th Circuit, was a suit to enjoin an Indian agent from obstructing plaintiff from prospecting for the purpose of selecting mineral lands thereon. Demurrer to bill overruled. Temporary injunction granted—on appeal—affirmed.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

The opinion, after citing authorities affecting the title to land, notably Minnesota v. Hitchcock, 185 U. S. 377, draws the distinction between cases, and cites most of the leading cases, contra, as follows:

"The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

"'If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.'"

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, before Sanborn and Smith, Circuit Judges, and Trieber, District Judge, was an appeal from the District Court for the District of South Dakota. The suit was by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Opinion by Sanborn, Circuit Judge, p. 74 et seq.

"(3) Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reser-

voir, and would compel specific performance of its contracts.

* * * * *

If the averments of the complainants are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. **They are, therefore, not the acts of the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts."**

In closing his opinion Judge Sanborn says, p. 82:

"(6) **The controlling reason** for the existence of the right to issue an interlocutory injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated.

"**A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult**, and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable."

The United States a Trader; Not a Government.

The majority opinions completely overlook the fact that in this transaction the United States was not acting in its sovereign capacity, nor in a governmental capacity. It

was engaged in a commercial enterprise, not only here, but in connection with the Mississippi-Warrior Service, and it was insisting that Mr. Goltra should not compete with that enterprise. In discussing rates the Secretary of War wrote Mr. Goltra, March 31, 1922 (R. 62, Ex. 6):

“But in any case I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in the operation by any action of the Government.”

And again he wrote May 25, 1922 (R. 65, Ex. 10):

“The officials of the Inland and Coastwise Waterways Service, and the Mississippi Section, have been instructed to co-operate with you to the fullest extent in making the operation of your fleet a success; the only limitation being that you shall not engage in such competition with them as to stifle the success of the Mississippi-River Service.”

On this subject Judge Sanborn said, in his dissenting opinion (R. 137):

“Again, the lease and contract of sale and the rights of all parties in interest thereunder arose from and evidence business or commercial transactions. In none of them was or is the United States acting as a sovereign in governing the Nation or the people of the Nation. The entire transaction and any interest

it may have in it and the property involved as against the plaintiff is a commercial and business and not a governmental matter. As against him it stands in the relation of a private party divested of its privileges and immunities as a sovereign and, hence, of its privilege of exemption from suit against the party it made the lessor in this contract and amenable to the suits to enforce it (*United States v. Planters Bank of Georgia*, 9 Wheaton 904)."

In the case of *South Carolina v. United States*, 199 U. S. 43, Mr. Justice Brewer makes some pertinent contrasts—applicable to the case at bar—between the exercise of governmental functions and functions of a private nature in which the state, the government, engages as a business.

To like effect is the language of Chief Justice Marshall in *Bank of U. S. v. Planters Bank of Georgia*, 9 Wheat. 904, where he said:

" 'It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.' "

These words are quoted and followed in many cases,
e. g.:

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
Panama R. R. v. Curran, 256 Fed. 772 (C. C. A.);
Lord & Burnham v. U. S. S. B. E. F. C. (D. C.),
256 Fed. 957;
The Pesaro, 277 Fed. 473 (D. C.).

To these adjudicated cases, add the language, in the same spirit, in the statute; that is to say: The operation of the transportation facilities is to be "in the same manner and to the same extent as if such transportation facilities were privately owned and operated."

Sec. 201 (e) of the Transportation Act of 1920 is as follows:

"(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act, 1916,' as now or hereafter amended, **in the same manner and to the same extent as if such transportation facilities were privately owned and operated;** and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein."

Whether the contracts are or are not to be considered for all purposes as contracts with the United States, the fact remains that the subject matter of said contracts related to the carrying on of a private business venture for a profit, in which the United States was a "partner," within the meaning of Chief Justice Marshall in the case of *Bank of U. S. v. Planters Bank of Ga.*, 9 Wheat. 904, and the numerous cases which followed it, and are cited elsewhere in this brief.

If the defendants combined together, and threatened to take away by force from the plaintiff the only property with which that partnership could be carried forward, etc., injunction is the only remedy.

We print in the Addenda the opinion rendered by the Honorable Charles B. Faris, Judge of the District Court, on the motion of the Government and of the defendants, to dismiss the cause on the ground that it was a suit against the Government. This opinion was rendered after the motion had been fully argued and briefed. We are submitting it not only because it fully answers the argument of the respondents, but also because it shows the Court's theory on which the point was decided. The opinion of the District Court in the granting of the temporary injunction is printed in the record (R. 45).

POINT VI.

Due Process of the Law.

The arbitrary seizure to deprive the petitioner herein of his property without due process of law, as guaranteed to him under the Fifth Amendment of the Constitution of the United States, is in violation thereof.

Not only did the acts of these respondents deprive this petitioner of his property without due process of law, as guaranteed to him under the Fifth Amendment of the Constitution of the United States, but their acts clearly demonstrate that they were intentionally evading process of the courts of this land and undertook to demonstrate that they were mightier than the courts.

The contract of lease and option to purchase clearly demonstrates that the petitioner herein entered into said contract for a good and valuable consideration as set forth therein, viz., that the petitioner agreed to and did release certain good and valuable claims which he maintained, as a result of entering into certain contracts and commitments in furtherance of providing munitions of war during the conflict with the Imperial Government of Germany.

Furthermore, the contract itself and the evidence adduced at the hearing conclusively show that the petitioner expended large sums of money in the matter of contracting for cargoes of oil, coal, manganese and other commodities subsequent to entering into the contract in ques-

tion and prior to the delivery of the boats and barges in anticipation of said delivery (R. 64). In taking over the fleet on or about July 15, 1922, the petitioner herein expended further large sums of money in purchasing the necessary amount of insurance and a bond in the sum of \$200,000.00, as provided for in said contract; and under the supplemental contract, May 26, 1921, the petitioner further expended sums of money for additional insurance and for the purchase of land upon which the unloading facilities were erected (R. 57).

At this point, we again call attention to the fact that when the boats and barges and the unloading facilities were turned over and delivered to the petitioner herein the contract of lease became an executed contract.

At the time of the delivery of the fleet and the unloading facilities, under the terms of the contract of lease and option to purchase and the supplemental contract, the petitioner herein became vested with definite property rights and title to the property as provided for in the contracts, some of which are directed to the Court's attention, as follows:

Under the terms of the contract of lease, the petitioner was vested with the property rights of possession, control and operation, as a lessee, for a definite and fixed term of five years, beginning with the date of delivery to the petitioner of the boats and barges (R. 5), and was also vested with the definite equitable title to the fleet and the unloading facilities under the definite terms of his option to purchase the entire equipment (R. 58).

The petitioner also expended large sums of money after the equipment was turned over and delivered to him for the purpose of making tests, alterations and changes in the equipment so as to make the boats and barges adaptable for transportation on the Mississippi River (R. 71), and for the purpose of building up an organization and securing contracts for transportation under the terms of said contract.

The facts and circumstances fully disclose and demonstrate that the real party or parties in interest in depriving the petitioner of his property without due process of law was not the Government of the United States in its sovereign and governmental capacity, but was Col. T. Q. Ashburn, the competitive barge line engaged in transportation of commodities on the Mississippi River as a common carrier known as the Mississippi-Warrior Service, the officials thereof, being civilians engaged in a commercial enterprise, and the private interests or private persons who ultimately expected to become the owner of all of the transportation facilities on the Mississippi River. The Mississippi-Warrior Service was operated by the Inland Waterways and Coastwise Service, of which Col. T. Q. Ashburn was the Chief. These were later succeeded by the Inland Waterways Corporation, created under the Act of June 3, 1924 (Fed. Stat. Ann. Supp. 1924, p. 185), which act provided for a civilian or an officer to be designated by the Secretary of War to become the Chairman of the Board and the executive head. Col.

T. Q. Ashburn was designated by the Secretary of War and appointed to the position of Chairman of the Board and the executive head of the Inland Waterways Corporation, which has taken over all of said transportation systems on the Mississippi River. This Act of Congress recognizes this as a commercial institution and provides for said corporation to sue and to be sued the same as a private corporation.

It will be remembered that the United States District Attorney at St. Louis informed the petitioner herein that the boats and barges in question were to be delivered to the Mississippi-Warrior Service, and that within about two years the Mississippi-Warrior Service expected to have these boats and barges turned over to private interests and to private persons (R. 81, 82).

Mr. C. E. Patton, Superintendent of the Mississippi-Warrior Service, who participated in the seizure, stated that these boats and barges were needed by the Mississippi-Warrior Service (R. 98). The actual seizure was made by Col. Ashburn, Chief of Inland Waterways and Coastwise Service with the equipment, officers and men of the Mississippi-Warrior Service.

There is nothing in the record to show that the Government in its sovereign or governmental capacity had need for these boats and barges, nor is there anything in the record to show that the Government in its sovereign or governmental capacity attempted to deprive the petitioner herein of his property, without due process of law. The

record does disclose that the Secretary of War and the Assistant Secretary of War signed certain orders, probably in a perfunctory manner at the specific instigation and request of Col. T. Q. Ashburn, Chief, Inland Waterways and Coastwise Service.

The Secretary of War fully realized his limitations in depriving the petitioner herein of his property rights without due process of law at the time he signed the order of March 3, 1923, declaring the said contract terminated, because at the same time he gave specific written directions to Col. T. Q. Ashburn to the effect: "in the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property" (R. 68).

On March 25, 1923, the petitioner herein was in absolute possession and control of all of the towboats, barges and unloading facilities with vested property rights therein as above disclosed.

On Sunday, March 25, 1923, between the hours of 8 and 9 o'clock, in the forenoon, without notice or warning to the petitioner or any of his representatives, Col. T. Q. Ashburn, through absolute secrecy, came to St. Louis, after having directed the officers of the Mississippi-Warrior Service to meet him in St. Louis so as to aid and assist him in arbitrarily seizing the boats and barges then in the possession and control of the petitioner herein, for the purpose of making the unlawful seizure.

The facts disclose that Col. Ashburn selected Sunday as the day for the seizure because he wanted secrecy and wanted to seize the boats and barges without interference on the part of the petitioner herein, and without any interference on the part of the United States District Court.

Not only did Col. Ashburn proceed to take physical possession of the property of the petitioner herein by means of threats, coercion, display or firearms and with a large force of men, but he hoped to deprive the petitioner of his property without the interference of the courts to which, he knew, the petitioner would go for redress. The facts disclose that it was impossible for the respondents to seize all of the equipment at one time and that it required several trips before possession was taken of all of the boats and barges. They labored until 10 o'clock Sunday night. They seized the boats and barges at St. Louis on the Missouri shore side, but immediately moved them to a point some distance south of St. Louis on the Illinois shore side for the specific purpose of attempting to evade the anticipated process of the United States District Court for the Eastern District of Missouri. The facts further disclose that on this Sunday, when business houses were closed, professional men were not at their offices, and when it was difficult to secure an order of the Court and to have the same served, the petitioner herein did, in view of all of these adverse conditions, have his counsel prepare a bill praying for a restraining order. This bill was hurriedly prepared on Sunday afternoon and an order of the Court

secured restraining the defendants from proceeding with the seizure and requiring, by a mandatory order, to return such equipment as the defendants had already seized. Col. Ashburn was notified Sunday afternoon that the petitioner herein was applying for a restraining order. He ignored this information and request to discontinue until the Court had an opportunity to have the order served upon him. The order of Court was served upon Col. Ashburn on Monday, March 26, but Col. Ashburn continued the seizure. He undertook to refuse to acknowledge service of the order. He was again served while he was moving the equipment south on the Mississippi River on Tuesday, March 27, before he had completed the seizure. He not only refused to acknowledge service of the order on this occasion, but undertook to prevent the United States Marshal from serving him. Although having been served twice with the order of the United States District Court restraining him from proceeding with the seizure, Col. Ashburn continued with the boats and barges to Fayville, where he seized three or four additional barges belonging to this fleet late Tuesday afternoon, March 27th. Col. Ashburn then proceeded on down the river to the Ohio River for the purpose of taking the boats and barges entirely out of the jurisdiction of the United States District Court for the Eastern District of Missouri with the specific intention and purpose of depriving the United States District Court of its jurisdiction (R. 95).

Although the order of the United States District Court directed him to return all of the boats and barges to St.

Louis, where he had seized them, these respondents herein filed motions in the United States District Court for the Eastern District of Missouri attacking the service and jurisdiction of this Court and in the meantime retained possession of the boats and barges. The boats and barges were retained in the possession of Col. Ashburn until about July 25, 1923, when they were returned under order of Court to the port at St. Louis. In the meantime, the Attorney-General of the United States, representing the United States, filed a motion in the Supreme Court of the United States praying for a writ of prohibition against the Judge of the United States District Court for the Eastern District of Missouri, and in pursuance to the filing of this motion in the Supreme Court of the United States, an ex parte petition was presented, in vacation, to the United States Supreme Court, praying for an order of that Court for the delivery of said boats and barges to Col. T. Q. Ashburn pending the action of the United States Supreme Court on the aforesaid motion for a writ of prohibition. Thereupon, Col. Ashburn and the Mississippi-Warrior Service again took possession of the boats and barges and thereafter retained possession until the United States District Court for the Eastern District of Missouri threatened the respondents with contempt proceedings, July 7, 1924, unless the respondents returned said boats and barges to the Court of St. Louis on or before July 11, 1924.

These facts are called to the Court's attention for the purpose of showing that the respondents not only deprived

the petitioner herein of his property without due process of law as guaranteed to him under the Fifth Amendment of the Constitution of the United States, but that the respondents acted in defiance of the petitioner's property rights and in defiance of the courts of our country.

In concluding our argument on this point, we quote the following paragraph from Judge Sanborn's opinion in this case (R. 139):

"The Fifth Amendment of the Constitution of the United States states: 'No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.' This provision of the Constitution forbids citizens, officers, courts, and the United States itself, from depriving any person of his property without due process. Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by the plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor, the writer is unable to bring his mind to the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3, 1923, requested such

an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday and the attempt to run it beyond the jurisdiction of the court below, constituted due process of law. To the writer they look more like an attempt to avoid or evade due process of law."

POINT VII.

Section 8 of the Contract of Lease and Option to Purchase Does Not Warrant the Forfeiture Power Claimed.

Section eight (8) of the contract of lease and option to purchase does not warrant the construction contended by the respondents and the construction placed thereon by the majority opinions of the court below to the effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein for such purposes, the power to terminate said contract for failure to operate as a common carrier, at his discretion or in his judgment, in an unwarranted, unlawful, and arbitrary manner, and the further power then to seize the fleet through an agency engaged in a competitive commercial enterprise for the purpose of depriving one citizen of his property to deliver the same over to a group of other citizens engaged in commerce and trade.

The above being true, the respondents must fail here and the Court below must be reversed on its conclusion as expressed in the majority opinions:

"While it may be conceded had the lease contained no provision for re-entry and retaking possession of the property, resort must have been had to some judicial tribunal in such case to ascertain and determine if conditions of the lease had been so broken as to terminate the lease" (R. 121).

The section under consideration reads as follows:

"8. The lessor reserves the right to inspect the plant, fleet and work at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the treasury or in the bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels" (R. 9).

Since it is contended that the Secretary of War exercised his discretionary power under the foregoing section, based upon the petitioner's alleged failure to operate said fleet as a common carrier as provided under section two (2), paragraph (a), this section shall be considered in connection with the former. Section 2 (a) provides.

"That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any re-

newals thereof, transporting iron ore, coal, and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier" (R. 5).

It will be noted that no discretion, power or authority, whatsoever, is given to the Secretary of War in section eight, but on the contrary whatever discretion, power or authority is granted therein is given to the lessor. No power or authority is granted the lessor under section 2 (a) but the matter of authorizing rates so as to enable the lessee to operate as a common carrier is left expressly to the Secretary of War.

An elementary principle of law is that forfeitures are not favored, in law, and one who seeks to enforce forfeiture must clearly establish his right to do so.

Phil. W. & B. R. Co. v. Howard, 13 How. 307;
Hartman v. C. B. & Q. R. Co., 182 S. W. 148.

This principle is concisely set forth in 6 Ruling Case Law, sec. 291, page 906, as follows:

"Before forfeiture can occur, there must be no question but that the parties intended to provide for it in the contract under which it is attempted to be enforced and when the contract is revocable at the

pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either party making the revocation.

"Forfeitures are enforced only where there is the clearest evidence that that was what was meant by the stipulation of the parties.

"Nothing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare. If technical forfeiture could be sustained by such intent, the effect would be to weaken private confidence in commercial faith, and occasion just solicitude as to the security of important rights."

Furthermore courts will not sanction the cancellation or termination of a contract by one party thereto by arbitrary decision or action even though the contract authorizes him terminating the contract.

The Anvil Mining Co. v. Humble, 153 U. S. 540. Justice Storey more clearly expresses this principle in 3 Story's Equity Jurisprudence (14th Ed. 1918), Chap. XXXVII, Sections 1728 and 1741, as follows:

"In reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man

cannot authorize gross oppression on the other side. And law as a science would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of Equity upon the broad ground of public policy or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of Equity Jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or fraud or oppression, or harsh and vindictive injury.”

“Sec. 1741 (Forfeiture Produced by Defendant Will Not Be Allowed to Prevail Against Rights of Complainant).—The policy of Courts of Equity is against the enforcement of conditions that would lead to the decree of a forfeiture, and where one seeks to bring himself within the reason and spirit of the rule, and enforce the instrument in terms, it is usually where the complainant is entitled to the condition or object sought, as a matter of law, although it be in terms a forfeiture or penalty. If in the deal-

ing between the parties, one has overreached the other, as if fraud, accident, or a mistake has been induced or if the defendant has purposely and intentionally brought such conditions and influence to bear upon the complainant, that he has been compelled to abandon his interest in the contract or property, or fail to properly perform his covenants, so that, strictly speaking, a forfeiture has occurred, a Court of Equity will intervene and prevent the enforcement of the forfeiture. It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act will not be permitted to take advantage of the nonperformance. * * * A Court of Equity looks at the substance rather than the form, and it will not permit an injustice of this sort to be effected, so that the contract cannot be fulfilled to the letter, and then decree a forfeiture."

Especially is it true where the party who seeks to enforce forfeiture is guilty of such acts which prevented the other party from complying with the terms of his contract.

United States v. U. S. Engineering & C. Co., 234
U. S. 236;
District of Columbia v. Cambden Iron Works, 181
U. S. 455;
Cheney v. Libby, 134 U. S. 69;
United States v. Peck, 102 U. S. 64.

In the light of these well-established principles let us

examine the contracts, the essential parts of which have heretofore been set out.

1. Who is the lessor designated in the contracts and with whom petitioner contracted?

The contract reads: "between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor."

Said contract is merely signed on behalf of lessor: "William M. Black, Major General, Chief of Engineers, U. S. Army (First Party)."

The alteration clause at the end of said contract reads: "It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army * * * party of the first part."

The supplemental contract, referring to the above, reads as follows:

"Whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor representing the United States of America."

Having the same question in mind, the Court, in the case of Sloan Shipyards Corp. v. United States Shipping

Board etc., 258 U. S. 549, through Mr. Justice Holmes, said:

"This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation—a corporation organized and existing, etc. (hereinafter called the 'Corporation'), representing the United States of America, party of the second part. Throughout the contract the undertakings of the party of the second part are expressed to be the undertakings of the Corporation, and it is this Corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. * * *

"The whole frame of the instrument seems to us plainly to recognize the corporation as the immediate party to the contract."

United States District Judge Baker, in the case of United States Harness Co. v. Graham et al., 288 Fed. 929, took the same view in the matter of a "**contract with the Government of the United States of America**, acting by and through E. C. Morse, Director of Sales, Supply Division, General Staff."

As in the Shipping Board case (*supra*), so in this case—the Chief of Engineers is the lessor and is plainly recognized as the immediate party to the contract. By the very terms of designation of parties he is so recognized, and by their own interpretation of the clause to the contract and in the supplemental contract he is so designated.

As in the Shipping Board case, so in this case, "Throughout the contract the undertakings" of the first party are expressed as the undertakings of the lessor (Chief of Engineers) with the exceptions of certain specific things therein are to be subject to the approval of the Secretary of War.

The Secretary of War is not a party to this contract, but is designated therein for certain specific purposes only, namely:

- (a) The money expended for the construction of the fleet was not appropriated to the Secretary of War, but to the United States Shipping Board Emergency Fleet Corporation—and was not allotted to the Secretary of War, but allotted to the Chief of Engineers.
- (b) The Secretary of War, under section 2 (a) must consent to rates to be charged if less than prevailing rail tariffs—and may consent to the use of said fleet other than as a common carrier.
- (c) The Secretary of War shall determine the amount of insurance, but the approval of the companies is left to the lessor.
- (d) Net earnings shall be turned over to the Secretary of War—who shall create a special deposit with the Treasurer of the United States.
- (e) In the event of lessor and lessee being unable to agree upon overhead expenses, same shall be referred to the Secretary of War, whose decision shall be final.
- (f) Under clause 7, relative to the option, the Secre-

tary of War may appoint the third member of a board of appraisers.

(g) Under paragraph 7 (b) the Secretary of War may retain certain deposits in the event of purchase under the option.

With exception to these specific provisions the Secretary of War is not mentioned therein and has absolutely no other authority, powers or duties.

Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service—and the Mississippi-Warrior Service are in no way parties to said contract—are in no way mentioned therein—and in no way are they or either of them given authority, powers or duties.

In all respects, except the foregoing, the Chief of Engineers, designated as the lessor, is the only and real party given the authority and powers and charged with the duties of seeing that all covenants are carried out in said contract.

Now, then, what is paragraph 8, which is relied upon by the defendants as a forfeiture clause?

By the interpretation placed upon this paragraph 8 by the lessor himself in the supplemental contract it is exactly what the parties to the contract intended it to be, viz., "Inspection (paragraph 8)"—Sec. 8 provides that the lessor (the Chief of Engineers) reserves the right to inspect the plant, fleet and work, at any time, to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employes are promptly

paid monthly or oftener; and noncompliance, in his (Chief of Engineers) judgment, with any of the terms or conditions will justify his (Chief of Engineers) terminating the lease and returning (who could return the property other than the party in possession—the lessee?) the plant and said barges and towboats to the lessor (Chief of Engineers), and all moneys in the Treasury or in the bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

Clearly paragraph 8 is an inspection provision reserved to the Chief of Engineers for certain specific things and upon inspection the Chief of Engineers might cancel said contract, but only for a failure to comply with the specific things mentioned, for a forfeiture clause cannot be enlarged or added to.

The paragraph has nothing to do with the covenant about operation of said fleet as a common carrier.

The Chief of Engineers had found no breach of the covenants or conditions referred to in said paragraph.

The Chief of Engineers (the lessor) had made no effort or attempt to declare a cancellation.

The Secretary of War has no express or implied authority, powers or duties under this paragraph.

The Chief of Inland and Coastwise Waterways Service, the Mississippi River-Warrior Service and Col. T. Q. Ashburn have no authority, powers or duties under same.

The only party named or designated therein, who has

any power or authority to receive said property, is the lessor (Chief of Engineers).

Neither the Secretary of War, nor Col. T. Q. Ashburn, nor the Mississippi River-Warrior Service, has any right, power or authority to receive, take or hold said property.

Certainly there can be no interpretation of said paragraph which, by implication or otherwise, would warrant even the lessor (Chief of Engineers) to seize said property by force of arms.

This was fully realized by the Secretary of War at the time he prepared his notice to petitioner under date of March 3, 1923, for, in his instructions to Col. T. Q. Ashburn, same date, he directed Col. Ashburn as follows:

“In the event of his failure or refusal to make delivery of the property demanded you will apply to the United States District Attorney at St. Louis requesting the institution of legal proceedings for the said property.”

Even though said paragraph 8 could be added to and enlarged, as defendants would have it (and which petitioner emphatically denies) so as to interpret the same with a view of empowering the Secretary of War to exercise such arbitrary powers under right of forfeiture, still the facts are such that the Secretary could not have declared a forfeiture upon the grounds of breach of covenant 2 (a) which pertains to the operation of said fleet as a carrier, especially without an opportunity on the part of petitioner to be heard.

In the first place, covenant 2 (a) has no provision relative to cancellation or forfeiture.

Said covenant is so ambiguous and uncertain as to make it impossible of explicit interpretation, especially in view of the interpretation placed upon said covenant, from time to time, by the parties and the Secretary of War.

The facts clearly show that complainant fully complied with said covenant in so far as he was able in view of the facts and circumstances as shown and that further compliance therewith was prevented and prohibited by the Secretary of War.

As is said in 3 Story's Equity Jurisprudence (Supra):

"If in the dealings between the parties, one has overreached the other, as if fraud, accident or a mistake has been induced, or if the defendant has purposely and intentionally brought such conditions and influence to bear upon the complainant, that he has been compelled to abandon his interest in the contract or property or fail to properly perform his covenants, so that, strictly speaking, a forfeiture has occurred, a court of equity will intervene and prevent the enforcement of the forfeiture."

Time Is Not of the Essence of This Contract.

It is obvious, at the time the contract was entered into, the parties could not determine a time when the fleet should be put into operation as a common carrier, and it was not the intention of the parties to make time of the

essence of the contract. The circumstances clearly show that it was impossible to determine when these boats and barges could be put into operation. The contract for the construction of towboats was entered into August 1, 1918 (R. 5). They were still under construction at the time the contract in question was entered into, May 28th, 1919 (R. 4). At the time of the execution of this contract it was uncertain whether three or four towboats were to be built (R. 10). Later, May 26th, 1921, it was determined that certain unloading facilities were necessary to carry on successful operations (R. 13). These were specially designed towboats and barges for towing coal, iron and iron ore on the Mississippi River, and it is apparent that neither the lessor nor the lessee could determine whether these specially designed boats and barges could be successfully operated on the Mississippi River. It is obvious that both parties knew that it would require some time to make experimental tests after the fleet had been completed and delivered to the lessee and contemplated certain changes and alterations. They also knew that a large fleet of four towboats and nineteen barges could not be profitably operated without establishing an organization to solicit freight. The parties also took into consideration the competition to be encountered with the established rail carriers and knew that the shipping public would not ship by barges at the same rate charged by the rail carrier. This is quite obvious because section 2 (a) provided for this, and realizing the inability of the par-

ties at that time, left the matter of determining and fixing the rate to be charged as a common carrier to the Secretary of War.

In view of these uncertainties no time was fixed or specified as to when these boats and barges were to be put into operation, nor were any specific rates provided for. Since no time was specified in section 2 (a), nor in any other clause of the contract, the parties contemplated that the fleet would be put into operation within a reasonable length of time after delivery of possession, and the question of reasonableness would be determined by the circumstances and conditions.

In addition to the above-mentioned circumstances and conditions, it must be remembered that subsequent to the execution of the contract of lease and option to purchase, May 28, 1919, the Government, through the Secretary of War, had entered the field and was engaged in the trade of transporting as a common carrier on the Mississippi River and its tributaries under the style of the Mississippi-Warrior Barge Service. This added further competition. The Secretary of War refused to permit the Goltra barges to enter into competition with the Mississippi-Warrior Service by denying to him the rates which would enable him to secure cargoes for his large and expensive equipment.

The boats and barges in question were not delivered to Mr. Goltra until July 15, 1922. Tests had to be made subsequent to the date of delivery. These tests and experi-

ments demonstrated that important and expensive changes had to be made. The towboats had to be converted from coal to oil burners. One of the towboats, the Illinois, was so converted.

Although restricted and prevented by the Secretary of War, these boats and barges were put into operation by Mr. Goltra, as soon as possible, and did succeed in contracting for two cargoes, one from a point on the Ohio River in Kentucky and the other from Hannibal, Missouri. It would be difficult to estimate how great the operations would have been, had the Secretary of War authorized rates so as to have permitted operation. It is obvious that the Secretary of War and the officers of the Mississippi-Warrior Service realized that the Goltra barges would have taken most of the grain and other commodities or at least a good portion. The navigation season ended December 15th, 1922, and the boats and barges were docked for winter. Goltra had possession from July 15th to December 15th, only five months before the navigation season ended. Navigation was not resumed on the Mississippi River until about the first of March, 1923. Before the Goltra fleet could be engaged in transportation at the opening of the navigation season about the first of March, 1923, he was served with notice of cancellation of his contract, March 4th, 1923, while he was in Washington, D. C.

Is it reasonable to hold that Mr. Goltra was given even a reasonable opportunity to put the fleet into operation,

reasonable time to do so, in view of the foregoing facts and circumstances?

In answer to the foregoing question, the Court will not only take into consideration the facts and circumstances *hereinabove set forth, but may also refer to page 144 of* the record wherein it is clearly demonstrated that if and when the petitioner herein was given a fair and reasonable opportunity to operate the barges and boats, he could and did operate the same. In the hearing before the United States District Court in September, 1924, when the Court ordered and directed the boats and barges to be turned over and delivered to the petitioner herein, the Court by its order made it possible for the petitioner herein to operate the same, in contrast to the failure to permit the petitioner to operate the boats and barges for the short period of time that they were in his possession from July 22, 1922, to March 3, 1923, including the non-navigable period during the winter months, by the Secretary of War.

Other Authorities Cited by the Court of Appeals.

Throughout the majority opinions the rights of the petitioner are overlooked. These opinions are based upon what the Court considers is the ultimate ownership of the boats and barges in the United States Government. It is forgotten that Mr. Goltra came into possession of these vessels through a legal contract, and that his original right to the possession is not to be questioned. It is also forgotten that through this contract Mr. Goltra has

the right himself to become the ultimate owner of the vessels, of which right he was deprived by the seizure. It is said that Mr. Goltra breached the lease, and said breach gave the Secretary of War the right to determine whether or not he had forfeited this right. The petitioner denies any breach, but very specifically denies the right of the Secretary of War to sit as a court and determine this judicial question. The petitioner contends that the defendants unlawfully interfered with his right of possession, not only by seizing the property with force of arms and thus depriving him of it, but also in adjudging a judicial question. The right of Mr. Goltra to have the courts determine the judicial question was recognized by the Secretary of War in his memorandum for Col. Ashburn (R. 67, 68, Plaintiff's Exhibit No. 12), wherein he instructed Col. Ashburn to apply to the United States District Attorney of St. Louis requesting the institution of legal proceedings for recovery of the property.

Now that Mr. Goltra seeks the interposition of a court of equity to protect his rights, and to prevent being unlawfully deprived of them, the defendants plead that the **United States Government** which is sued and this position is erroneously sustained by the majority opinions.

The elementary principle that a sovereignty cannot be sued without its consent is, of course, conceded, but the majority opinions fail to distinguish between the cases which hold that a sovereignty cannot be deprived of its property in a suit, or sued without its consent, and those

cases we have cited holding that a suit may be maintained against a government officer when he is proceeding unlawfully. As was said in Judge Faris' first opinion refusing to dismiss this case (Addenda, this brief, p. 105):

“Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally these cases are of the type of Wells v. Roper, 246 U. S. 355; Oregon v. Hitchcock, 202 U. S. 60; Naganab v. Hitchcock, 202 U. S. 473; Stanley v. Schwalby, 162 U. S. 255; Louisiana v. Garfield, 211 U. S. 70; Louisiana v. McAdoo, 234 U. S. 627; all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide*, *The Siren*, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post offices and post roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.”

And by the United States Court of Appeals (Eighth Circuit), in *Wadsworth v. Boysen*, 148 Fed. 771:

“The case at bar falls within that class where the individual complainant seeks redress against one or more persons for an invasion of his property rights, and who pretend to be acting under a warrant of

some federal statute or official, in which the complainant asserts that neither the statute nor the public law confers any such right upon the wrongdoer. As said in *Noble v. Union River Logging Railroad*, 147 U. S. 172:

“If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.”

A brief mention of the other authorities cited in the majority opinions will show that we are correct in our analysis of them. Those authorities are as follows:

Marbury v. Madison, 1 Cranch. 137, the famous decision by Chief Justice Marshall, was an action for a writ of mandamus, an original proceeding in the Supreme Court to compel the Secretary of State to issue a commission. It was held that mandamus was the proper remedy, but the writ was refused on the ground the Supreme Court did not have original jurisdiction, and it is interesting to quote the following paragraph from the decision (l. c. 163):

“The Government of the United States has been emphatically termed a government of laws and not of men. It will cease to deserve this high appellation if the laws furnish no remedy for the violation of the vested legal rights.”

Marquez v. Frisbe, 101 U. S. 473. This case involves title to land which was in the United States, and it

was there held that the courts would not interfere with officials of the Government while in the discharge of their duties in disposing of public lands. The Court also said:

“After the United States has parted with its title, and the individual has become vested with it, the equities on which he holds it may be enforced.”

So in the case at bar, even if the United States originally held title to the vessels, it had parted at least with the equitable title to them.

Gaines v. Thompson, 7 Wall. 347. Title to land in the United States. Suit to enjoin the Commissioner of the Land Office from canceling an entry.

U. S. v. Black, 128 U. S. 40; U. S. v. Windom, 137 U. S. 636; Decatur v. Paulding, 14 Pet. 497, and Dakota Telephone Co. v. Dakota, 250 U. S. 184, all involve proceedings against officers of the Government, who by the law had power to exercise their discretion and, therefore, with this discretion the courts refused to interfere, but in U. S. v. Windom, *supra*, one of the grounds for refusing the writ of mandamus was that ‘he relator had other remedies.

United States ex rel. Oil Co. v. Hitchcock, 190 U. S. 316. Title to land in the United States. Suit in mandamus to compel issuance of letters patent.

Minnesota v. Hitchcock, 185 U. S. 373. Suit to restrain Secretary of the Interior from selling land, title to which was in the United States, and to divest that title.

Stanley v. Schwalby, 162 U. S. 255. Suit in trespass to try title to land, the record title which was in the United States.

In re Ayers, 123 U. S. 443. Suit to restrain the Attorney-General of Virginia from instituting suit to collect taxes.

Clearly none of these cases are applicable to the case at bar and with some of them the majority opinions are in conflict.

CONCLUSION.

The attitude of the three officers of the Government is rather inconsistent. The Constitution is supreme law of the land and the Government expects and exacts the most scrupulous respect for it under severe penalties. Here we have an army officer, Col. T. Q. Ashburn, directly violating his orders, committing a trespass and depriving a citizen, who has contracted in good faith with Government officials, of his property and rights, this in direct violation of the Constitution.

Col. Ashburn's orders were, in the event Mr. Goltra declined to surrender the towboats and barges, to "apply to the United States District Attorney at St. Louis requesting the institution of legal proceedings for the recovery of said property." Up to this point some regard seems to have been had for law by the Government officials, but that disappeared when the army officer, accompanied by a large force of men, took violent and forcible posses-

sion of the property, depriving the complainant of his day in court and of his property without due process of law.

If the officials of the United States Government demand respect for the law and require obedience, how can they expect such when they themselves have no respect for it? It is a dangerous thing for this Government to decide matters of private right with an army colonel and a force of men. (See Judge Faris' opinion, R. 48, 49.)

Confessedly the defendants had guilty knowledge of the illegality of the act of seizure, else they would not have selected Sunday for it, a day when it might be thought impossible for the Court to act. Now they contend, and the majority opinions hold, that this is a suit against the United States. These opinions have the effect of making the original wrongful act of Col. Ashburn and the other defendants successful and of holding that the army of the United States, and not the courts, shall decide the rights of property of citizens in time of peace, a thing we feel sure this Honorable Court will refuse to do.

One thought more. Should the Government officials be successful in this proceeding what faith can our citizens have in Government contracts in the future? Will any citizen rely upon written promises of the United States Government if they can be violated by its army without a moment's notice?

If there ever was a case which required a court of equity to act to prevent such usurpation of authority of which these defendants have been guilty, this is one. The acts of Secretary Weeks and Col. Ashburn, together with the connivance of the United States District Attorney, was a tyrannical use of the military power of this Government. This same branch attempted the same methods in the United States Harness case, supra, and was thwarted there. If such acts, of which these men have been guilty, are permitted to go unchallenged, this country will be in no position to complain of the militaristic governments of Europe.

We most respectfully ask that the decree of the United States Circuit Court of Appeals for the Eighth Judicial Circuit be reversed.

Respectfully submitted,

JOSEPH T. DAVIS,

DOUGLAS W. ROBERT,

Solicitors for Petitioners.

ADDENDA.

District Court of the United States in and for the Eastern
Division of the Eastern Judicial District of Missouri.

Edward F. Goltra,
vs.
Weeks et al.,

Plaintiff,

Defendants.

No. 6639.
In Equity.

Oral Opinion of the Court on Motion to Dismiss Bill.

Faris, J.

Plaintiff entered into charter party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four tow-boats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the defendants in the manner hereinafter more specifically set out.

The parties to this lease or charter party are recited in the instrument thus:

“This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of

War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part."

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employes of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be taken from him without due process of law, and without any process of law whatever, and in contravention of the charter party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn, and Carroll, as District Attorney of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a

necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for noncompliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such noncompliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that not only does the language of the charter party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emer-

gency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a quasi private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 566).

By the Act of Congress of June 5, 1920 (41 Stat. 988), the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes and existing contracts about them had placed¹ such custody and control.

For the Act of June 5, 1920, excepted these vessels from

the transfer to the Shipping Board by a proviso to section 4 of said act, which proviso reads:

“Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this act.”

Since the vessels in dispute were not only “vessels assigned to inland waterways,” but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War Department, to plaintiff here; for, on the second of the above propositions the bill before me says:

“These vessels were not completed until long after said date (that is to say May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922.”

Whether this allegation is true or not, does not, of course, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and control in the War Department arose solely by reason of the fact that the \$3,860,000.00 with which they were constructed had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was

subordinate to and acted under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the provisions of Paragraph 4, Section 6 of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by section 6, supra, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said Section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said section 201, which reads thus:

“Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis.”

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof, provided,

that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly limits the laws, regulations and liabilities to admiralty laws and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525), whereby, inter alia, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or in rem.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific application of clause (d) of Section 201, supra, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt that the United States is the beneficial

owner of them. It owns them because it owned, and now owns, all of the capital stock of the Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation which the latter ever used or ever had. But, in a sense, the United States was a *cestui que* trust of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a quasi private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to pre-war normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

- (a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation;
- (b) That the said Fleet Corporation was a quasi private corporation, in which all of the capital stock was owned by the United States;
- (c) That all of the money with which the Fleet Corporation operated came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the revenues of the United States, by the Act of March 1, 1918 (40 Stat. 438), or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent (*Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549).

This case here at bar, it is true, is not an action against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of Wells v. Roper, 246 U. S. 355; Oregon v. Hitchcock, 202 U. S. 60; Naganab v. Hitcheock, 202 U. S. 473; Stanley v. Schwalby, 162 U. S. 255; Louisiana v. Garfield, 211 U. S. 70; Louisiana v. McAdoo, 234 U. S. 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under alodial tenure as a sovereign, with vessels (vide, *The Siren*, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post offices and post roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of Kaufman v. Lee, 106 U. S. 196, wherein suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way as a military reservation, and Stanley v. Schwalby, 162 U. S. 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps subsists. The difference between the two cases, as they are distinguished by the Supreme Court in the Stanley case, is that in the Lee case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the Stanley case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the Lee case, *supra* (Kaufman, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to the jurisdiction of the trial court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the

courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Ship Yards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secre-

tary of War would have constituted that due process of law which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case in this pertinent and apposite language:

“No man,” said Mr. Justice Miller, “in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to the supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

“Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his

property by force, his estate seized and converted to the use of a government without lawful authority, without process of law and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly, no government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately, at least, countenanced only lawful repossession, the presumption ought to be entertained, that the acts of de-

fendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive that a similar view, in a very similar case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this Government, these alone ought to suffice.

Without more, I am of the opinion that the motion to dismiss on the grounds now urged by defendants ought to be overruled, and so it will be ordered.

April 30, 1923.

St. Louis, Missouri.

